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File No. O. Irrig. /41

K

Legal **DEPARTMENT**

A. BRANCH

Subject:—

Opinions under the

Bombay. Irrigation Act, 1879.

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Hr/25/4

smd 26/4

It appears that the Distributary No. 10 of the Godavari E.B. Canal on which Mr Landage carries on irrigation as a tenant irrigator has been included in the Factory limits of the Godavari Sugar Mills Limited (vide Government Memorandum P.W.D. N . 2530/36-I, dated 14th October 1940) The one and garden blocks of 13 a.20 g. and 1 a 20 g. respectively sanctioned in the name of Mr. Landage have been ordered to be cancelled with effect from 15th February 1942 after giving twelve months' notice under the proviso to rule 27(2) of the Bombay Canal Rules. Mr. Landage has given notice of a suit against Government contending that cancellation of his blocks before the expiry of the period of supply sanctioned would be illegal. The questions raised for consideration of the E.L.A. are:-

(1) Whether it would be competent for the Executive Engineer to cancel Mr. Landage's blocks after twelve months' notice under the proviso to rule 27(2) of the Bombay Canal Rules; and

(2) Whether Government would be liable to pay Mr. Landage the costs of notice.

2. Rule 27(2) of the Bombay Canal Rules provides that a block may be cancelled at the request of the person on whose application the supply is sanctioned, while the proviso thereto lays down that the Executive Engineer may, at any time after giving twelve months' notice cancel any block or any part of any block if in his opinion further continuance of supply of water to it is objectionable. (Similar conditions are inserted in condition No. 6 of the conditions incorporated in the Form III of applications for supply of water in blocks). The words " at any time" clearly indicate that it is open to the Executive Engineer to cancel even before the expiry of the period for which the supply of water is sanctioned provided that (1) twelve months' notice is given and (2) further continuance of supply of water is

considered to be objectionable. Since a factory area has been created in this part it is competent for Government to regulate the order of perference if any. in the matter of allotment of the available water according to the needs of such area and the available supply of canal water for irrigation even to the prejudice of the normal or prior interest of the other irrigators provided the supply of water is not sufficient.' (See H.L.A's opinion No. 5483, dated 22nd November 1938). The Executive Engineer presumbaly holds that the creation of a factory area in the present case does not admit of the full normal supply of water in the existing blocks. If so, the continuance of supply of water in the blocks of Mr. Landage would be deemed to be objectionable within the meaning of theproviso to rule 29(2) Consequently the action taken by the Executive Engineer to stop the supply of water in the blocks of Mr. Landage even before the expiry of the sanctioned period of supply of water is lawful and the suit, if filed, would be defensible.'

3. Since the acton proposed is legal, Government would not be liable to pay thecosts of notice given by Mr. Landage.

Sd/- 12/10

Superintendent of Legal Affairs.

U.R. to P.W.D. No 1062), dated the 12th September 1941

Ex/25/4

... that the water which under the rules shall be supplied to the applicants will be derived from the lakes vesting in the Bombay Municipality. By virtue of the provisions of section 71 of the Bombay Irrigation Act, 1879, the Act has no application to such lakes and therefore no rules can be made under the Act prescribing the amounts of charges to be paid by persons for the water supplied to them or for any other matters (Vide para. 2 of H.L.A.'s opinion No 7424 dated 23rd December 2035). The rules at pages 133-40 cannot, therefore, be made under section 71 of the Bombay Irrigation Act. The view taken on this point in para. 3 of the P.W.D. office note at page 161 ante is correct. There is, however, no objection to making non-statutory rules for the purpose. Rules 24 and 25 are not in order and will have to be omitted. Rule 24 confers certain powers on the Executive Engineer to open any roads etc. The road might be vesting in a municipality. Non-statutory rules cannot confer any powers on the Executive Engineer which might affect the rights of third parties. Rule 25 creates certain offences punishable by a court of law. No offences can be created by non-statutory rules. The provisions of rule 23(b) are also open to objection. The rule provides inter alia that the arrears of due shall be payable by the purchaser or a transfree of the property personally. A non-statutory rule cannot create liabilities in respect of third parties. The provision in the rule, therefore, in so far as it provides for such a liability on the purchaser or transfree of the property will be of no effect and will have consequently to be deleted.

Sd/- 3/10
Remembrancer of Legal Affairs.

U.O. to P.W.D. No. 9463 dated 3rd November 1941

Seen and returned.

2. In the absence of any fresh legislation it would not be legally feasible to levy a water rate for the supply of water by percolation in respect of wells sunk in lands not vesting in the Crown even when those wells may be situated within any particular distance from the boundaries of a canal, when the water from these wells is used for purposes other than irrigation. The view expressed in the Public Works Department office note at page 11 ante is correct.

Sd/
24/11

Remembrancer of Legal Affairs

U.H. to P.W.D., No. 10104 , dated the 26th November 1941 .

Ir/25/4

... Secretary of State v. Balwant Ganesh (I.L.R. 28 Bom 105 at p. 118) the Bombay High Court has held that a natural stream, though its flow of water be in part derived by percolation from a canal, is not a "canal" until the Governor in Council has applied to it the provisions of section 5 of the Bombay Irrigation Act, 1879. The condition precedent to the application of section 5 is that Government should be satisfied that the water of such stream should be applied or used for the purpose of an existing or projecting canal (see R.L.A opinion No 126 Confl. dated 18-10-1929). It is presumed that the water of the rivers in the present case is to be applied for the purpose of an existing canal. If so there would be no legal objection to applying section 5 of the Bombay Irrigation Act to the parts of the Pravara, Godavari and Mira rivers as proposed by Commissioner , Central Division, at page 29 ante.

2. Section 12 of the Bombay Irrigation Act can be used only if injury to the public health or public convenience, or to any canal or to any land for which irrigation from a canal is available, has risen or may arise from the obstructi It is no doubt true that the pumping installation or the erection of landings in the beds of these rivers may have caused obstruction to the flow of the streams therein; but there is nothing to show that any injury to the public health or public convenience or to any canal or any land has arisen orpay arise from such obstruction within the meaning of section 12. A notification under section 12 will therefore be of doubtful validity in this case. (See R.L.A's opinion No 6186 of 8.7.40)

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Remembrancer of Legal Affairs.

U.R. to P.W.D., No 10444 dated 5th December 1941.

Rv/25/4

The question raised for consideration of the R.L.A. are:-

(1) whether the playing of boats without permission in "Lakes" which are "canals" within the meaning of section 3(1) of the Bombay Irrigation Act, 1879, would attract the provisions of section 61(1) and (6); if so,

(2) whether it would be possible to frame rules under section 70 to regulate such plying; if not,

(3) whether it would be necessary to undertake legislation for the purpose.

2. The plying of boats in lakes which are canals as defined in section 3(1) of the Bombay Irrigation Act, 1879 does not by itself involve any damage, alteration, enlargement or obstruction to the canals nor would it appear to involve any crossing of such canals. Consequently neither clause(1) nor clause(6) of section 6 would be attracted. The reply to the first question therefore in the negative. That being so, the second question therein does not survive. The only course feasible to regulate the playing of boats in lakes would be to undertake legislation for the purpose. The Bill to amend the Bombay Ferries Act, 1868, now under consideration would achieve the object in view.

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22/12
Remembrancer of Legal Affairs.

U.R. to P.W.D., No 11093, dated the 23rd December 1941.

Hr/25/4

Office of the R.L.A.

As pointed out in R.L.A.'s opinion No 9463, dated 3rd November 1941 the rules are non-statutory rules. Such rules cannot create a charge on any property, neither can they provide that any amount due shall be recovered as arrears of land revenue. Rules 22(b) is consequently of no effect and shd should be omitted from the draft rules.

Sd/-
28/4/
Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 3627, dated the 29th April 1942

Mr/25/4